

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	
Request of Mark W. Dobronski for)	
Clarification and Declaratory Ruling)	
_____	/	

REQUEST FOR CLARIFICATION AND DECLARATORY RULING

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Petitioner In Propria Persona

Date: December 13, 2023

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To: Alejandro Roark
Chief, Consumer & Governmental Affairs Bureau

REQUEST FOR CLARIFICATION AND DECLARATORY RULING

Pursuant to Section 1.2 of the Commission’s Rules,¹ Petitioner Mark W. Dobronski (“Petitioner”) respectfully requests that the Bureau clarify, on an expedited basis, the statutory authority by which the Commission adopted its rule Section 64.1601(e)² under the Telephone Consumer Protection Act (“TCPA”)³, which mandates that any person or entity that engages in telemarketing must transmit caller identification information.⁴ Specifically, Petitioner requests clarification whether the Commission adopted the subject regulation pursuant to the authority

¹ 47 C.F.R. § 1.2.

² 47 C.F.R. § 64.1601(e).

³ 47 U.S.C. § 227.

⁴ *See* 47 C.F.R. § 64.1601(e).

of subsection *b*, *c*, or *d* of the TCPA statute⁵, or some other statutory section.

I. BACKGROUND

In enacting the TCPA, Congress expressly created a private right of action which allows ordinary citizens who have received violative telephone calls or unsolicited advertisements to seek injunctive relief, monetary relief, and treble damages in a court of competent jurisdiction. The statutory damages available under the TCPA are, in fact, specifically designed to appeal to plaintiffs' self-interest and to direct that self-interest toward the public good: like statutory compensation for whistleblowers, they operate as bounties, increasing the incentives for private enforcement of law. *See, e.g., Arnold Chapman & Paldo Sign & Display Co. v. Wagener Equities Inc.*, 747 F.3d 489, 492 (7th Cir. 2014). The private right of action under TCPA demonstrates Congressional intent to incentivize aggrieved parties to act as “private attorneys general”. *Universal Underwriters Ins. Co. v. Lou Fusz Automotive Network, Inc.*, 401 F.3d 876, 881 (8th Cir. 2005). Designing a cause of action with the purpose of enlisting the public in a law's enforcement scheme is a well-established tool that can be found in areas ranging from antitrust and civil rights law to environmental law and false claims.

The TCPA, however, does not create a private right of action for every violation of the provisions, but instead creates such a right only in specific circumstances. For example, the “Private Right of Action” provision of § 227(b) applies only to “a violation of the subsection or the regulations prescribed under this subsection.” 47 U.S.C. § 227(b)(3)(A). Similarly, the “Private Right of Action” provision of § 227(c) applies only to a “violation of the regulations

⁵ 47 U.S.C. § 227(b),(c),(d).

prescribed under this subsection.” 47 U.S.C. § 227(c)(5)(A). Congress clearly knew how to create a private right of action, having done so for § 227(b) and § 227(c); but, the fact that it did so for subsection (b) and subsection (c), but not subsection (d) or subsection (e) of 47 U.S.C. § 227 manifests a legislative intent not to create a private right of action under subsection (d) or subsection (e) of the statute. *See Touche Ross & Co. V. Redington*, 442 U.S. 560, 571-72, 99 S.Ct. 2479, 61 L.Ed. 2d 82 (1979) (holding that there is no private right of action where Congress provided for such a right in some sections, but not in others).

It is a simple matter to recognize what “a violation of the subsection” is under § 227(b) is and that such a violation may expose the person making such a call to a private right of action by recipient of said call. However, what is not explicitly clear under either § 227(b)(3) or § 227(c)(5) are the “regulations prescribed under this subsection” being referenced.

When the Commission implements regulations under the TCPA, the Commission does not expressly denote whether the Commission has acted pursuant to the authority of § 227(b)(3) or § 227(c)(5), or some other statutory section, with regard to each new regulation or rule which the Commission adopts. This leaves the persons making such calls, the recipients of such calls, and the courts all in a position of having to deduce, as to each TCPA regulation, the authority by which the Commission adopted same and, whether there is a private right of action attached thereto.

Some regulations are facially apparent as to the statutory authority by which they exist. For example, the regulations set forth at 47 C.F.R. § 64.1200(a) appear to have been promulgated by the Commission pursuant to the authority delegated by 47 U.S.C. 227(b)(2). Likewise, the

regulations set forth at 47 C.F.R. § 64.1200(c) appear to have been promulgated by the Commission pursuant to the authority delegated by 47 U.S.C. § 227(c).

However, not all TCPA regulations adopted by the Commission are so apparent as to the statutory authority the Commission was acting under when it adopted the regulation. One such regulation with uncertain lineage is 47 C.F.R. § 64.1601(e), which promulgates as follows

“(e) Any person or entity that engages in telemarketing, as defined in section 64.1200(f)(10) must transmit caller identification information.

(1) For purposes of this paragraph, caller identification information must include either CPN or ANI, and, when available by the telemarketer's carrier, the name of the telemarketer. It shall not be a violation of this paragraph to substitute (for the name and phone number used in, or billed for, making the call) the name of the seller on behalf of which the telemarketing call is placed and the seller's customer service telephone number. The telephone number so provided must permit any individual to make a do-not-call request during regular business hours.

(2) Any person or entity that engages in telemarketing is prohibited from blocking the transmission of caller identification information.

(3) Tax-exempt nonprofit organizations are not required to comply with this paragraph.”

[47 C.F.R. § 64.1601(e)].

II. CONFUSION IN THE COURTS

Numerous courts have been called upon by private plaintiffs to enforce this regulation against defendants who have run afoul of the TCPA. However, there is a conflict of opinions between the various courts as to whether there is a private right of action associated with Section 64.1601(e). Courts are frequent to lament that the TCPA is a source of confusion. See

Rosenberg v. LoanDepot.com LLC, 435 F.Supp.3d 308, 322 (D.Mass., 2020) (“The Court recognizes that the TCPA is a complex statute which does require interpretation.”); *Glasser v. Hilton Grand Vacations Company, LLC*, 948 F.3d 1301, 1306 (C.A.11, 2020) (“Clarity, we lament, does not leap off this page of the U.S. Code.”); *Gonzalez v. HOSOPO Corporation*, 371 F.Supp.3d 26, 34 (D.Mass., 2019) (“The TCPA is an unusually confusing statute.”).

Courts declaring that there is no private right of action. On the contrary side, in *Worsham v. Travel Options, Inc.*, the Court held that there was no private right of action stemming from a violation of 47 C.F.R. § 64.1601(e). However, in that case, judge was clearly having some difficulty in determining under which subsection of 47 U.S.C. § 227 the subject regulation – 47 C.F.R. § 64.1601(e) – was adopted and explained his quandry, as follows:

“In recognition of the role played by Caller ID in helping consumers avoid unwanted calls, and in conjunction with other amendments to its TCPA regulations in § 64.1200 et seq., the FCC specifically amended this set of regulations in 2003 by adding § 64.1601(e), which requires telemarketers to transmit caller identification information, including either calling party number (“CPN”) or automatic number identification of the calling party’s billing number (“ANI”) and, when available by the telemarketer’s carrier, the telemarketer’s name; this regulation also prohibited telemarketers from blocking the transmission of caller identification information. Rules and Regulations Implementing...(TCPA), 68 Fed. Reg. at 44,179. **However, it is not clear whether § 64.1601(e) is promulgated under either subsection b or subsection c of the TCPA.** Caller ID technology does not fit neatly into the focus of either subsection, neither of which requires the use of such technology to accomplish their respective purposes. **Thus, it is also not clear whether a violation of § 64.1601(e) falls within the private right of action granted by subsection b or subsection c.**“

Worsham v. Travel Options, Inc., 2016 WL 4592373, at *4 (D.Md., 2016). Ultimately, the judge

decided:

“As previously concluded, an asserted violation of 47 C.F.R. § 64.1601(e)(1) is not properly brought under either the TCPA’s subsection b or subsection c. Any violation of § 64.1601(e)(1) is a violation of technical and procedural standards under subsection d, and as earlier noted, no private right of action exists under the latter subsection of the TCPA.”

Worsham v. Travel Options, Inc., 2016 WL 4592373, at *7 (D.Md., 2016).

However, the *Travel Options* judge apparently failed to read beyond the subsection title of 47 U.S.C. § 227(d), as nowhere in subsection *d* is there any mention of caller identification. Subsection *d* expressly – and solely -- addresses technical and procedural standards for telephone facsimile machines and artificial or prerecorded voice systems.

Four cases involving this same Petitioner previously brought in the Eastern District of Michigan have concluded that the TCPA does not authorize a private right of action under 47 C.F.R. 64.1601(e), to wit: *Dobronski v. Tobias & Assocs.*, Case No. 5:23-cv-10331, 2023 WL 7005844, at *8 (E.D. Mich. Sept. 25, 2023); *Dobronski v. Total Ins. Brokers*, 2021 WL 4452218, at *2 (E.D. Mich. Sept. 29, 2021); *Dobronski v. SunPath Ltd.*, No. 19-13094, 2020 WL 8840311, at *7 (E.D. Mich. July 27, 2020); *Dobronski v. Selectquote Ins. Servs.*, 462 F. Supp. 3d at 790 (E.D. Mich. 2020). All four of the *Dobronski* decisions cited, *supra*, noted the absence of any contrary authority and expressly relied upon the findings in the *Worsham v. Travel Options, Inc.*, No. JKB-14-2749 2016 WL 4592372, at *7 (D. Md. September 2, 2016) as being “persuasive” that a private right of action does not exist under 47 C.F.R. § 64.1601(e)(1).

Courts declaring that there is a private right of action. More recently, a three judge panel on a state appellate court considered this same issue and unanimously determined that a

private right of action does exist for violations of 47 C.F.R. § 64.1601(e). In *Worsham v. Life Station, Inc.*, the Court of Special Appeals of Maryland opined and very cogently and concisely explained:

“[T]he first amended complaint alleges a violation of 47 C.F.R. § 64.1601(e)(1), an FCC regulation requiring that ‘[a]ny person or entity that engages in telemarketing, as defined in 47 C.F.R. § 64.1200(f)(10), must transmit’ certain information via Caller ID. The circuit court ruled that Mr. Worsham could not bring a private cause of action for violation of this regulation, relying again on the **unreported decision** in *Travel Options*, which **rather hesitantly determined** that the regulation was promulgated under the authority of § 227(d), rather than § 227(c), of the TCPA. *Travel Options*, 2016 WL 4592373, at *7; see also *Dobronski v. Selectquote Ins. Servs.*, 462 F. Supp. 3d 784, 789-90 (E.D. Mich. 2020).

Section 64.1601(e)(1) prohibits telemarketers from appearing on telephone subscribers’ Caller IDs as ‘unknown’ by requiring them to transmit certain Caller ID information, including the Calling Party Number (“CPN”) or Automatic Numbering Information (“ANI”), and, if possible, the name of the telemarketer.

The regulation further provides that the information provided must be sufficient to ‘permit any individual to make a do-not-call request during regular business hours.’ 47 C.F.R. § 64.1601(e)(1). Thus, at an initial glance, § 64.1601(e)(1) contains aspects that seem to further the purposes of both § 227(c) and (d). We must therefore explore each further.

Section 227(c) authorizes the FCC to promulgate rules to protect telephone consumers’ privacy rights and create rules that will allow consumers to ‘avoid receiving telephone solicitations to which they object.’ The FCC is directed to do so by ‘compar[ing] and evaluat[ing] alternative methods and procedures (including ... telephone network technologies ...) for their effectiveness in protecting such privacy rights.’ 47 U.S.C. § 227(c)(1)(A). Section 227(d), on the other hand, instructs the FCC to (1) revise its rules for telephone facsimile machines, requiring the use of machines that can mark the faxed pages with identifying information, (2)

prescribe rules requiring automatic or prerecorded telemarketing messages to include the identity of the telemarketer at the beginning of the message and its telephone number or address during, or at the end, of the message, and (3) automatically release the called party's line within five seconds. Importantly, as discussed above, § 227(d) does not purport to regulate live telemarketing calls.

In adopting § 64.1601(e)(1), the FCC reasoned that ‘Caller ID allows consumers to screen out unwanted calls and to identify companies that they wish to ask not to call again. Knowing the identity of the caller is also helpful to consumers who feel frightened or threatened by hang-up and dead air calls.’ 68 Fed. Reg. at 44,167. Additionally, Caller ID allows a consumer to ‘make a do-not-call request during regular business hours,’ § 64.1601(e)(1), further protecting the subscriber's privacy right by preventing future calls. Although the FCC's consideration of what network information must be transmitted via Caller ID is technical, we think it falls within the scope of the technologies that § 227(c)(1)(A) directed the FCC to consider in protecting the privacy rights of consumers. See 68 Fed. Reg. at 44,166-67 (evaluating the cost efficiency and availability of different network technologies for network transmission).

Although the question is not free from doubt and the lines between regulations authorized by § 227(c) and (d) (or, perhaps, some combination of both) could be far clearer, for two reasons, we conclude that **§ 64.1601(e)(1) was promulgated pursuant to § 227(c)** and, therefore, that **a private right of action exists to enforce its provisions**. First, to the extent the express terms of § 64.1601(e)(1) apply to live telemarketing calls, they would **exceed the scope of regulation authorized by § 227(d)**, but not the scope of § 227(c). Second, by requiring the provision of information expressly for the purpose of allowing individuals ‘to make a do-not-call request,’ the regulation serves the purpose of § 227(c) of ‘protect[ing] subscribers from unrestricted commercial telemarketing calls.’ 68 Fed. Reg. at 44,167.” [Emphasis added.]

Worsham v. LifeStation, Inc., No. 661, Sept. 2020 Term, 2021 WL 5358876, at *16–17 (Md. Ct. Spec. App., November 17, 2021).

The need to remove uncertainty and end this controversy. By this petition, Petitioner is requesting the Commission to issue a declaratory order to remove the uncertainty and end this controversy.

III. DISCUSSION

The regulation at issue was promulgated by the Commission in 2003 and was codified at 47 C.F.R. § 64.1601(e). In its *Report and Order* issued in the Commission's docket *Rules and Regulations Implementing the TCPA*,⁶ the Commission adopted, *inter alia*, rules "requir[ing] all companies conducting telemarketing to transmit caller identification (caller ID) information, when available, and prohibits them from blocking such information." *R&O*, 18 FCC Rcd. at 14017, ¶ 1. The Commission expressly recites in the *R&O* that it has adopted the regulations set forth therein, including the newly promulgated § 64.1601(e), pursuant to the authority of 47 U.S.C. § 227 and the Do-Not-Call Implementation Act, Public Law 108-10, 117 Stat. 557. The entirety of the *R&O* addresses the regulatory requirements promulgated by Congress and delegated to the Commission under the various sub-subsections of 47 U.S.C. § 227(c). The TCPA requires the Commission "to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." 47 U.S.C. § 227(c)(1). Further, the TCPA directs the Commission to "compare and evaluate alternative methods and procedures" including the use of electronic databases and other alternatives in protecting such privacy rights. 47 U.S.C. § 227(c)(1)(a)

⁶ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, FCC 03-153, CG Docket No. 02-278, 18 FCC Rcd. 14014 (released July 3, 2003) ("*R&O*").

In the *R&O*, the Commission states:

“We revise the TCPA rules and adopt new rules to **provide consumers with several options for avoiding unwanted telephone solicitations**. Specifically, we establish with the Federal Trade Commission (FTC) a national do-not-call registry for consumers who wish to avoid unwanted telemarketing calls... The new rules will also **require all companies conducting telemarketing to transmit caller identification (caller ID) information**, when available, and prohibit them from blocking such information...”

R&O, 18 FCC Rcd. at 14017, ¶ 1 (2003). Clearly, the requirement for caller identification is an alternative method or procedure in protecting such privacy rights. *See* 47 U.S.C. § 227(c)(1)(A). This leads to the reasonable conclusion that the FCC was acting within its delegated authority under 47 U.S.C. § 227(c) when it promulgated § 64.1601(e).

It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress. *American Library Association. v. F.C.C.*, 406 F.3d 689, 691, 365 U.S.App.D.C. 353, 355 (C.A.D.C., 2005). Congress has delegated to the FCC authority to promulgate binding legal rules to carry out the provisions of the TCPA. *Palm Beach Golf Center-Boca, Inc. v. John G. Sarris, D.D.S., P.A.*, 781 F.3d 1245, 1256 (11th Cir. 2015). Under the TCPA, Congress has delegated rulemaking authority to the Commission in four regards, as follows:

- Pursuant to 47 U.S.C. § 227(b), to adopt rules restricting the use of automatic telephone dialing systems.
- Pursuant to 47 U.S.C. § 227(c), to adopt rules

protecting subscriber privacy rights to avoid receiving telephone solicitations to which they object.

- Pursuant to 47 U.S.C. § 227(d), to adopt technical and procedural standards expressly applicable to telephone facsimile machines, automatic telephone dialing systems, and artificial or pre-recorded voice messages.
- Lastly, pursuant to 47 U.S.C. § 227(e), to adopt rules prohibiting the provision of inaccurate caller identification information with the intent to defraud, cause harm, or wrongfully obtain anything of value.

On first blush, it might appear that 47 C.F.R. § 64.1601(e) was adopted pursuant to the authority of 47 U.S.C. § 227(e) as both discuss caller identification. However, the statute and the regulation each address different evils. The regulation – 47 C.F.R. § 64.1601(e) -- requires that “[a]ny person or entity that engages in *telemarketing*... *must* transmit caller identification information.” Additionally, the telephone number so provided must permit any individual to make a do-not-call request during regular business hours. 47 C.F.R. § 64.1601(e)(1). Lastly, *telemarketers* are prohibited from blocking the transmission of caller identification information. 47 C.F.R. § 64.1601(e)(2). On the other hand, the statute – 47 U.S.C. § 227(e) – makes it unlawful for *any person*, in connection with any voice service or text messaging service, to cause

any caller identification service to knowingly transmit *misleading or inaccurate caller identification* information with the intent to defraud, cause harm, or wrongfully obtain anything of value. 47 U.S.C. § 227(e)(1). Further, and differing from the regulation, the statute expressly does not prevent or restrict *any person* from blocking the capability of any caller identification service to transmit caller identification information. 47 U.S.C. § 227(e)(2). However, most critical to the analysis is the fact that the regulation – 47 C.F.R. § 64.1601(e) -- was adopted by the Commission in 2003, but the statute – 47 U.S.C. 227(e) – was not enacted by Congress until 16 years later, in 2019. Thus, 47 U.S.C. § 227(e) could not have been the authority under which the Commission adopted 47 C.F.R. § 64.1601(e).

47 U.S.C. § 227(d) is also eliminated as being the authority by which the FCC adopted 47 C.F.R. § 64.1601(e), as the display of caller identification information is not a technical or procedural standard applicable to a telephone facsimile machine, an automatic telephone dialing system, or an artificial or pre-recorded voice message.

Likewise, 47 U.S.C. § 227(b) is also eliminated being the authority by which the FCC adopted 47 C.F.R. § 64.1601(e), as caller identification is not a restriction on the use of automatic telephone dialing systems.

By *modus ponens*, this leaves 47 U.S.C. § 227(c) as being the authority by which apparently the FCC adopted 47 C.F.R. § 64.1601(e). Requiring telemarketers to transmit caller identification information is clearly a regulation designed “to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object.” *See* 47 U.S.C. § 227(c)(1). The FCC expressly recognized this fact in the *R&O*. *See R&O*, 18 FCC

Rcd. at 14121, ¶ 179 (“Caller ID allows consumers to screen out unwanted calls and to identify companies that they wish to ask not to call again.”)

IV. CONCLUSION

Accordingly, the Bureau should clarify that 47 C.F.R. 64.1601(e) is a regulation that was adopted by the Commission pursuant to the rulemaking authority delegated to it by 47 U.S.C. § 227(c), and specifically 47 U.S.C. § 227(c)(1)(A).

Respectfully submitted,



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